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In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN MARITIME ASSOCIATION, PETITIONER

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 590 F. 2d 1156. The opinion of the district court (Pet. App. 36a-62a) is reported at 458 F. Supp. 849.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1978. The petition for a writ of certiorari was filed on February 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 27 of the Jones Act prohibits foreign-flag vessels from transporting Alaskan crude oil from Valdez, Alaska, to St. Croix in the United States Virgin Islands for refining and processing.

STATEMENT

Since 1977, shortly after the Trans-Alaska Pipeline System began operations, respondent Amerada Hess Corporation (Hess) has chartered foreign-flag tankers to carry crude oil from Valdez, Alaska to its refinery in St. Croix, United States Virgin Islands (Pet. App. 4a-5a). At the refinery, Hess processes the crude oil into a variety of petroleum products, including gasoline, diesel fuel, fuel for power plants, sulfur pellets and various petrochemicals (*id.* at 13a-14a). It then ships these products to ports on the United States mainland.

Petitioner and other organizations representing domestic shipping interests[1] brought this suit against Hess and the Secretary of the Treasury[2] in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief to require that Hess use American-flag ships to carry its oil from Valdez to St. Croix. Petitioner based its complaint on Section 27 of the Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. 883, which forbids, on penalty of forfeiture, any "merchandise" to be carried by water "between points in the United States, including * * * possessions thereof embraced within the coastwise laws * * *," except in American-flag ships.

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[1]See Pet. App. 37a.

[2]Permission of the Secretary of the Treasury is necessary before any foreign vessel may proceed from one point in the United States to another. 46 U.S.C. 313; Reorganization Plan No. 26 of 1950, 64 Stat. 1280. See also 19 C.F.R. 4.84. Petitioner sought to enjoin the Secretary from issuing a permit to the Hercules, a tanker of Liberian registry that was preparing to transport Hess' first load of Alaskan crude oil to St. Croix. Pet. App. 39a.

The district court denied relief and dismissed the complaint.[3] It relied on Section 21 of the Jones Act, 46 U.S.C. 877, which provides:

> [T]he coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands * * *.

No president has ever issued such a proclamation. Pet. App. 41a.

The district court held that the exemption "applies clearly to voyages that *begin* or *terminate* in the Virgin Islands" and does not apply to "shipments between points in the United States *by way of* the Virgin Islands" (Pet. App. 41a; emphasis added). The issue, then, was "whether this shipment of crude oil constitutes two discrete shipments of different merchandise and hence is exempt from the Jones Act, or whether it constitutes one continuous voyage and thus is subject to the Jones Act." *Id.* at 42a. The court adopted the Customs Service's "consistently maintained" interpretation of the Jones Act (*id.* at 57a; see also Pet. App. 16a n.38) and held that "continuity of transport is broken when the merchandise is manufactured or processed into a new and different product" (*id.* at 59a).

Applying that test to the shipment of crude oil in this case, the court concluded that "all the credible evidence of record conclusively demonstrates that the products of the Hess refinery [in the Virgin Islands] are new and different

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[3]The district court concluded that no final action had been taken sufficient to make the case ripe for judicial review (Pet. App. 47a-50a), but it assumed finality in order to reach the merits (*id.* at 50a). We question the propriety of such a procedure, because jurisdictional issues should be reached before making decisions on the merits. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 119-124 (1976).

merchandise from the Alaskan crude oil" (*id.* at 61a), and thus the Jones Act does not prohibit Hess from using foreign vessels to transport crude oil from Alaska to the Virgin Islands. *Id.* at 62a.[4]

The court of appeals affirmed (Pet. App. 1a-33a). It agreed with the district court that because the refined products are "new and different merchandise from the Alaskan crude oil" (*id.* at 14a), the shipments from Alaska to the Virgin Islands, and from the Virgin Islands to the mainland, are separate shipments and thus within the Virgin Islands exception to the American-flag requirement (*id.* at 16a, 18a-20a). It noted that statutes authorizing forfeitures are to be strictly construed (*id.* at 20a-22a). It also recognized that Congress on at least 10 occasions has refused to extend the coastwise laws to the Virgin Islands, and that the judiciary therefore should not "rush without clearest guidance from other, accountable branches of Government to erect new and formidable trade barriers" by barring foreign ships from carrying Alaskan crude oil to the Virgin Islands (*id.* at 23a-28a).[5]

ARGUMENT

The decision of the court of appeals is correct. Although the decision may have substantial consequences for U.S. flag shipping,[6] it does not conflict with decisions

[4]The district court also held that the plaintiffs had standing to sue (Pet. App. 42a-47a) and that the Magnuson Amendment to the Ports and Waterways Safety Act of 1972, 46 U.S.C. 391a(7)(C), did not limit the Virgin Islands exception in the Jones Act (Pet. App. 51a-53a).

[5]The court of appeals agreed with the district court (see note 4, *supra*) that the Magnuson Amendment did not restrict the carriage of Alaskan crude oil to American-flag vessels. Pet. App. 28a-33a.

[6]The Maritime Administration of the Department of Commerce believes that some of the U.S.-owned vessels operating under the Jones Act and financed under its vessel loan guarantee program (Title XI of the Merchant Marine Act of 1936, 46 U.S.C. 1271-1279) may be denied employment as a consequence of the court of appeals' decision. This creates the possibility that there will be defaults in shipowners' bond payments, which could exceed $100 million. The government would be required by its guarantees to make payments following such defaults.

of this or any other court, and petitioner presents no issue warranting this Court's review.

Petitioner does not dispute the fact that Section 21 of the Jones Act exempts the Virgin Islands from the restrictions on coastwise trade and thus allows foreign-flag vessels to carry merchandise in voyages beginning or ending in the Virgin Islands. Nor does petitioner seriously challenge the conclusions of both lower courts that, by refining Alaskan crude oil in the Virgin Islands, Hess manufactures new products from raw materials, and thus no single shipment of "merchandise" takes place between Alaska and the mainland—points subject to the coastwise laws. Rather, petitioner argues that, under the Commerce Clause, Congress has the power to regulate interstate commerce both before and after intermediate processing, or "manufacturing," of the goods involved; that is, manufacture does not interrupt the flow of commerce to such an extent that Congress is divested of its authority to regulate that flow from beginning to end (Pet. 7-11, 18-19). Petitioner points to other exercises of the commerce power (*e.g.*, the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1 *et seq.*) to show that Congress has exercised this authority to the fullest in other contexts, and suggests (Pet. 7) that the court of appeals was mistaken in concluding that Congress did not exercise it fully here.

Petitioner's argument that Congress has plenary authority to regulate the "flow" of commerce is beside the point. No one disputes that Congress could, if it wished, extend the American-flag requirement to the shipments involved here. It could, in the exercise of its commerce

power, amend the Jones Act to provide that an intermediate manufacturing or refining process in the Virgin Islands or elsewhere does not result in new "merchandise" on the voyage from the point of manufacture to the mainland. Similarly, a presidential proclamation could achieve the same effect. But the court of appeals recognized this authority and recognized also that Congress and the President have chosen not to exercise it here:

> Though manufacture or processing of a product may to too "incidental" to interrupt the flow of commerce generally, such alteration in the nature of the goods may yet be substantial enough to exempt those goods from the intended reach of a particular statute.

Pet. App. 22a n.54; see Pet. 6.

The fact that Congress has exercised its authority to establish particular rules for commerce in other contexts (see Pet. 7) does not show that Congress adopted the particular rule for which petitioner contends. The court of appeals did not view in isolation Section 27's restrictions on the "transport[ ]" of "merchandise" in foreign vessels. It also considered, as it was bound to do, Section 21 of the same Act, in which Congress provided that, unless the President declares otherwise, voyages to or from the Virgin Islands are not subject to the restrictions that Section 27 imposes on coastwise trade. Congress has consistently refused to delete the Virgin Islands exemption despite petitioner's repeated requests that it do so in order to oust foreign vessels from the Alaska-Virgin Islands-mainland traffic in crude oil and refined petroleum products (see Pet. App. 24a-25a). Had Section 21 never been enacted, there might be room for petitioner to argue that Section 27 extends to every aspect of interstate commerce. But Section 21 forecloses any such argument.

The court of appeals here simply recognized that Congress and the President have declined to give petitioner the relief it seeks.[7]

Petitioner fares no better in its attack on the principle that forfeiture statutes are to be strictly construed (Pet. 16-17). The court of appeals' decision did not turn on the construction of forfeiture statutes; the court simply referred to the principle of strict construction to reinforce the conclusion that Congress did not intend the shipments at issue here to be subject to the restrictions on coastwise trade (Pet. App. 20a-22a & n.54).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]For this reason, petitioner's contention (Pet. 15-16) that the Virgin Islands exemption has outlived its usefulness and "give[s] adventitious benefits primarily to non-Virgin Islands interests" is irrelevant, as is its contention (Pet. 17-19) that the loss of trade to foreign vessels is substantial. These are arguments for Congress or the President, not for this Court.

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